U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2003

CASE NO.: 2003-LHC-682

OWCP NO.: 07-160655

IN THE MATTER OF:

THOMAS STUTES,
Claimant

v.

APOLLO SERVICES, INC.,
Employer

and

LOUISIANA WORKERS' COMPENSATION,
CORPORATION,
Carrier

APPEARANCES:

Karl W. Bengston, Esq.
On behalf of Claimant

Travis R. LeBleu, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Thomas Stutes

(Claimant), against Apollo Services, Inc. (Employer) and Louisiana Workers' Compensation Corporation (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 26, 2003, at Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called Mrs. Janice Stutes and Mr. Ben Stonecipher, and introduced ten exhibits, which were admitted, including: the deposition and medical records of Dr. Heard; and the medical records of Dr. Franklin, Dr. Uhr, Dr. Stueben, Dr. Vogel, Lafayette General Medical Center and the Quick Care Clinic.[1] Employer also called Mr. Stonecipher and introduced two exhibits, which were admitted, including: Claimant's deposition and medical records of Santa Barbara Cottage Hospital. Additionally, the parties introduced one joint exhibit, Claimant's pay stubs from Employer, which was admitted.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on August 27 or 28, 1999;

2. The accident occurred within the course and scope of employment;

3. An employer-employee relationship existed at the time of Claimant's accident;

4. Employer filed a Notice of Controversion on October 21, 2001;

5. An informal conference was held on February 7, 2002.

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Joint exhibits- JX-__, p.__.

[2] Claimant submitted an 8 page, double spaced brief on September 12, 2003. Employer submitted a 7 page, double spaced brief on September 10, 2003.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's injury;

2. Causal relationship between injury and employment;

2. Claimant's average weekly wage at the time of accident;

III. STATEMENT OF THE CASE

A. Chronology:

Claimant was a field service technician for Employer in August 1999. On either the 27 or 28 of that month, he was unhooking hoses from the barge his crew was working on when the last hose exploded, hit him in the chest and threw him against the barge. Claimant was alone at the time of the incident, although his superintendent arrived shortly after for a shift change. Claimant reported the incident to the superintendent, but he was told to call the main office. Claimant did not report the whole incident to the office over the phone, but waited until he arrived on land two days later to inform Employer of the incident. Claimant was sent to Quick Care Clinic for evaluation on September 3, 1999, and was released to light duty work for a few days before returning to regular duty work. In September 1999 Claimant also saw Dr. Uhr and Dr. Stueben for his rectal bleeding. At his first visit to Dr. Stueben on September 21, 1999, Claimant complained of back pains, but he did not seek treatment at that time.

Claimant returned to light duty work following his accident, but soon resumed his regular duty job. He continued to work for Employer until April 2000, when he suffered a heart attack and was declared totally disabled by his cardiologist. On August 30, 2000, Claimant saw Dr. Heard for complaints of back and neck pain. Claimant also reported moderate chest pain, headaches and ankle swelling. MRIs taken of Claimant's cervical, thoracic and lumbar spine indicated protrusions at C2-3, C3-4, T9-10, T11-12, and L4-5 levels with stenosis at the C6-7 level, nerve root compression at T9-10 and spinal cord compression at T11-12. Since August 2000, Claimant's condition has remained unchanged; he has consistently reported neck, mid-back and low-back pain with varying tingling and burning sensation in his arms, legs, and chest. Dr. Heard has treated Claimant conservatively since his first visit in August 2000, explaining Claimant's heart condition makes him an undesirable candidate for spinal surgery. Claimant has not been able to return to his former job.

B. Claimant's Testimony

Claimant testified that on the morning of his alleged accident his crew was transferring buoys, which required him to undo the hoses and hook them back up on the barge. Claimant was working alongside head superintendent Warren Bourrel, who went on break and left Claimant alone to undo the hoses. Claimant testified he turned on the equipment and something got plugged. He began to break each hose off individually; when he took the last one off it exploded like a 10-gauge, flared up like a snake and hit him in the chest, throwing him back against the barge and to his knees. He was down for 10 minutes, when Mr. Bourrel returned with his son Mike, also a superintendent, for a crew change. Claimant testified he told both Warren and Mike about his accident, including his rib pain and bleeding, but they told him to call the main office. Claimant was not aware either of them filled out an accident report; he testified they did not want to do anything about his accident or injuries. (Tr. 46-48, 63).

Claimant called employer's main office and told them about his rectal bleeding and hemorrhoids, but did not tell them about his accident because he was concerned for his job. On cross-examination, Claimant clarified he did not say anything about his accident or back injury in front of the tool pusher, who was present for the telephone conversation, because he did not want to jeopardize his job by complaining too much. (Tr. 49, 73-76). Claimant stayed on the rig until Employer was able to find someone to replace him. He was flown to shore two days after the incident and went directly to Employer's office. There, he informed Mr. Stonecipher, Johnny from Employer's personnel office and the safety man about the incident, back injury and bleeding. (Tr. 50-51, 76, 79).

Employer's safety man sent Claimant to Quick Care Clinic to be checked out. Claimant testified he did not fill out the chart at Quick Care or draw on the chart's diagram; someone filled it out for him. He told the doctors he was hit in the chest by a three-inch pressure hose and was experiencing chest pain which radiated to his back. On cross-examination, Claimant testified Quick Care was the first medical provider he saw after his accident, and he does not know why the doctor did not mark his back pain on the diagram. (Tr. 59, 52). Quick Care could not do much for him, so Claimant saw Dr. Marilyn Uhr. Claimant testified he told Dr. Uhr about the pain radiating from his chest to his back, but she could not do anything for him. Claimant did not know why she wrote "no more pain" in his chart on January 18, 2000. Dr. Uhr referred Claimant to Dr. Stueben. Claimant testified Employer's safety man accompanied him to see Dr. Stueben. (Tr. 51, 82).

Claimant testified he returned to work at Employer after seeing Drs. Uhr and Stueben. He was placed on light duty for a few weeks, which involved swinging a 10-15 pound sledgehammer in Employer's yard. Thereafter, Claimant returned to his regular offshore duty and worked for Employer until he had a heart attack in April 2000. He testified he could feel his body going through changes in the months following his accident, leading up to his heart attack. (Tr. 53-54). Claimant stated he had two heart surgeries following his heart attack and has followed up with his cardiologist every two months. He testified he was still having back pains, which he informed his cardiologist of; however, his doctor was more concerned about his heart because that was more important than his back. (Tr. 56, 64).

Claimant testified he focused on stabilizing his heart before he made arrangements to see Dr. Heard for his back problems.[3] He did not seek treatment for his back right away because he had not received any money from Employer, despite the fact they said they would take care of him if his back was hurt. Claimant testified he had to get a lawyer in order to make an appointment with Dr. Heard; if Employer would have paid his bills he would have gotten checked out much sooner. Claimant testified money issues, and then his heart complications, prevented him from being able to tend to his back pains. On cross-examination, Claimant testified he attempted to see Dr. Heard three weeks after his accident, but Dr. Heard required him to have a lawyer, which he obtained one year later. (Tr. 64-65, 67). Claimant also testified he received short-term disability payments for one year following his heart attack; however, he did not know whether he received these payments when he saw Dr. Heard. (Tr. 80).

Claimant testified he first presented to Dr. Heard in 2000 with the same complaints he had been having since his accident, including chest pain radiating to his back and shoulders with numbness. At his deposition, Claimant testified he has had symptoms in his neck, arms, back and legs everyday, although some days are worse than others; the pain is not consistent and different parts of his body hurt more on different days. On a scale of one to ten, one being no pain, Claimant testified his pain registers at a four on the good days, and an eight on the bad days. He estimates he has three or four bad days per week. (Tr. 56; EX-1, pp. 8-10, 14). Claimant specified he has pain in his shoulders and arms, from his neck to the bottom of his shoulder blades, from his shoulder blades to his belt line, in the center of his tailbone and in his legs and feet. In particular, Claimant stated his mid-back has a constant, nagging pain; his arm and shoulder pains come and go; and his leg pain are not every day, but consist of burning and swelling sometimes down to his toes. Claimant testified Drs. Patel and Yazsdi have seen the swelling in his legs, but cannot remember if Dr. Heard has seen it. (EX-1, pp. 11, 13, 21-25).

[3] Claimant testified he saw Dr. Heard in the early 1990s for a pinched nerve. He deferred to Dr. Heard's record for the exact date of his surgery. (Tr. 56).

At the hearing, Claimant testified his condition has not changed, and Dr. Heard has not been able to find a treatment for him; surgery is unlikely because of his heart condition. Claimant stated he cannot take many pain medications because they counteract with his heart medication. He only takes over the counter pain medication, which his wife buys for him. Claimant testified he has good and bad days; he tires out more easily and cannot do the things he used to, especially lifting. He also testified he tries to walk 1.5 miles once a week, but he tires out easily and has problems with leg cramps. He also has problems walking up stairs. (Tr. 57-58, 68-69; EX-1, pp. 37-38). At his deposition, Claimant stated he is receiving social security disability benefits, but has no other financial assistance. Employer paid him $3,500 per month, as well as bonuses between $500 and $1000. (EX-1, pp. 29-30).

C. Testimony of Janice Stutes

Mrs. Stutes has been married to Claimant for 22 years. As Claimant has limited reading and writing capabilities, she has taken care of their paperwork and has been involved in Claimant's medical care. (Tr. 30).

Mrs. Stutes testified Claimant called her from the rig in August 1999 to inform her he was hit by a hose and was coming into shore to see a doctor. She stated Claimant went to Quick Care, and then saw Dr. Stueben, a gastroenterology specialist, because he had blood in his stool.[4] Mrs. Stutes testified she accompanied Claimant to see Dr. Stueben on September 21, 1999, at which time he complained of pain in his chest, ribs and back. She admitted this was the only mention of Claimant's back pain between September 1999 and April 2000. (Tr. 31-32, 41). Mrs. Stutes stated Claimant saw Dr. Uhr, an internist, for his rectal bleeding. Although she did not accompany him on the visit and did not hear what his complaints were, Mrs. Stutes testified Claimant did not report any back pains to Dr. Uhr. Mrs. Stutes also testified she did not mention Claimant's back problems in the phone messages she left for Dr. Uhr. (Tr. 32, 38-40).

Mrs. Stutes testified Claimant continued to work until April 2000, when he experienced heart problems while working in California. She stated he complained to her about his back between August 1999 and April 2000; however, she did not inform Mr. Stonecipher of Claimant's back problems during this time period. Mrs. Stutes testified Claimant could no longer sleep on his back because it hurt too much in the center of his back. She also stated Claimant used Ibuprofen and mineral ice to ease his pain. (Tr. 32-33, 43). His activities have been restricted, as well; he can no longer take care of the lawn, lift heavy objects or walk as long as he used to, all because of his back pains. (Tr.

[4] Mrs. Stutes testified Dr. Stueben removed some polyps for Claimant in 2000, but nothing else. (Tr. 42).

36-37). On cross-examination, Mrs. Stutes testified Claimant had a back injury in 1991 and she believes Dr. Stueben placed him on light duty work restrictions. (Tr. 44-45).

Mrs. Stutes testified Claimant first saw Dr. Heard about the pain in his rib cage in 2001, although she could not remember the date. Mrs. Stutes testified she informed Mr. Stonecipher that Claimant was going to see an orthopedic specialist; he told her Employer had arranged for an appointment but did not have the money to pay for it, so Claimant would have to put it on his hospitalization insurance. Mrs. Stutes stated she refused to do this because she felt his back injury was related to his work incident in 1999, and that Claimant's hospitalization insurance should not pay for an orthopedic consultation. (Tr. 34-35). She testified Claimant has followed up with Dr. Heard since his first visit; his last appointment was in March or May, and he has another one scheduled for after the hearing. She believes his back pain seems worse now than when he first started treatment with Dr. Heard. (Tr. 35-37).

D. Testimony of Ben Stonecipher

Stonecipher, Employer's administrative manager, testified Employer treats and disposes of oilfield waste.[5] As administrative manager, he was primarily involved in human resource activities; however, he also purchased Employer's insurance, got involved in claims in that he would collect data and make it available as needed, and he performed general administrative tasks. Stonecipher was not involved in the actual offshore operations of Employer's business. (Tr. 17-18).

Stonecipher testified Claimant was a field service technician; he assisted in hooking up equipment such as vacuums and augers, in order to transport waste. This position involves heavy work, including lifting box lids, dragging hoses and climbing ladders. Stonecipher testified Claimant worked 12-hour shifts for the extent of the jobs he was on, either 5, 12, or 14 days; sometimes Claimant would work 30 days and then have 30 days off. (Tr. 27-28). Stonecipher testified Claimant disclosed a prior back injury from 1991 on his pre-employment application; he was hired and then cleared by Employer's doctor to work light, medium and heavy jobs. (Tr. 25-26).

[5] For purposes of brevity, witnesses will be referred to by last name only. I note that at the time of the hearing, Stonecipher had been promoted to human resources manager. Additionally, in February 2002, Employer was sold to Baker Hughes Intex, but is still involved in the same business of oilfield waste disposal. (Tr. 17).

Stonecipher testified he was aware Claimant had an accident in September or late August of 1999. He did not recall speaking to Claimant about it, but stated either Johnny or the doctors would have reported it to him. Generally, Stonecipher became aware of an accident and doctor's visit after the fact, by receipt of a written or oral report from the supervising doctor.[6] He testified the general procedure is to send an injured employee to Quick Care; if an injury or accident is minor, Stonecipher often only hears there was an incident and the employee was put back to light duty. Stonecipher testified the same happened in Claimant's case; he heard Claimant came into the office, went to the doctor and was released to light duty work. He knew Claimant had missed one or two days of work, and was placed on light duty for two or three days. Based on this information, Stonecipher did not believe there was a problem. (Tr. 18-19, 83-84, 87-88). Stonecipher testified he did not hear about Claimant's back injury until August 2000. He talked with Mrs. Stutes several times, but did not remember her mentioning any back problems until several months after Claimant's heart attack.[7] Stonecipher testified he had a hard time relating Claimant's complaints of back problems and rectal bleeding to the accident because they arose one year after the accident.[8] (Tr. 85-86).

Stonecipher testified he did not recognize the signature on Employer's First Report of Injury, which he identified as that of Mark Bellou. Stonecipher also did not know who paid for Quick Care's services to Claimant, although he assumed Employer would pay for any Quick Care bills. (Tr. 19-21). Stonecipher clarified he is only involved with the insurance aspect of a claim; he does not have anything to do with disputing a claim. (Tr. 23). Stonecipher testified he was not involved with handling Claimant's medical services in August 2000, although he was aware Claimant saw Dr. Heard for back problems. Stonecipher stated he did not approve this visit because he had no indication Claimant's back problems were related to his incident one year earlier. (Tr. 21).

E. Exhibits

(1) Deposition and Medical Records of Michel E. Heard, M.D.

[6] If the injury is not serious, it was common for Stonecipher to only receive a verbal report. (Tr. 19).

[7] Mr. Stonecipher testified these conversations were in reference to Claimant's polyps which Dr. Stueben removed; he knew Claimant had a history of medical problems, and did not think the polyps were related to his employment. (Tr. 84-85).

[8] Mr. Stonecipher also testified he knew Claimant had a surgery, possibly an anal fissure, before working at Employer; therefore, he thought the rectal bleeding was not work related. (Tr. 86).

Dr. Heard testified by deposition on June 18, 2003. He is a board certified orthopedic surgeon who has been in private practice for twenty-two years. Dr. Heard testified he is Claimant's treating physician for neck and back pains.[9] (CX-10, pp. 5-6). Claimant first presented to Dr. Heard on August 30, 2000, as a 39-year old male with chest and back pain following an occupational accident. Claimant complained of ankle swelling, headaches, intermittent chest pain that was moderate to severe, constant and severe burning in his mid-back that was worse on the left side, constant and severe right and left paralumbar pain, as well as pain in his neck and upper arms. Claimant reported to Dr. Heard that his neck and back pain began about one week after the accident, but the pain in his chest and mid-back, along with his rectal bleeding, began the day of the incident. Claimant told Dr. Heard he had not worked since August 1999, although he did some work in April 2000. (CX-1, p. 18). A physical exam of Claimant revealed tenderness over his right and left paracervical and trapezius, mild limitation of bending in the lumbar, and tenderness in the midline lower lumbar, right and left paralumbar and mid thoracic areas. X-rays showed mid-thoracic multi-level spurring. Dr. Heard diagnosed Claimant with post-traumatic neck, mid-back and low back pains, headaches and chest wall pains. He opined Claimant's neck and back condition was probably the result of his work accident, if it was not symptomatic before August 1999, but was symptomatic after without any intervening traumas. (CX-1, pp. 19-20).

Dr. Heard next saw Claimant on February 6, 2001. Claimant presented with constant severe pain in his mid and low back, and numbness in his upper and lower leg and foot. A lumbar MRI taken January 31 showed a disc protrusion at the L4-5 level with mild stenosis, and a disc abnormality at the T11-12 level. *Id.* at 16. At his March 1, 2001, follow-up, Claimant's condition was essentially unchanged, although he complained of moderate to severe chest pain, and twitching and tingling in his toes. *Id.* at 15. On March 14, Dr. Heard noted Claimant had the same symptoms and he also reviewed cervical and thoracic MRIs taken on February 14, 2001. The cervical MRI showed moderate disc protrusion at the C2-3 level with a flattening of the cord, but no nerve root compression. There was also a mild protrusion at the C3-4 level and mild foraminal stenosis at C6-7. The thoracic MRI showed spondylosis with associated right paramedian disc protrusion at T9-10 with nerve root compression and a T11-12 left paramedian protrusion with cord compression. Dr. Heard stated Claimant was unable to work; he recommended conservative treatment and opined Claimant may need spinal surgery. (CX-1, p. 13). Over the next two and one-half years, Claimant's condition did not change significantly. His symptoms continued to vary in intensity and nature,

[9] Dr. Heard examined Claimant on fourteen occasions, including: August 30, 2000, February 6, March 3, 14, April 18, May 8, June 6, August 13, October 24 and December 18, 2001, March 6, May 8, July 22, December 9, 2002, and May 27, 2003. He also had an appointment scheduled for August 2003, after the hearing. (CX-1, pp. 1-20).

however they were generally the same. Claimant consistently presented with neck, mid and low back pain, either moderate or severe; occasionally he reported additional twitching or numbness in his legs and arms. *Id.* at 1-12.

Dr. Heard explained at his deposition that cord compression causes radiating pains from the irritated nerve, resulting upper motor neuron problems, including spasticity, twitching and problems walking. Specifically, mid-thoracic cord compressions may cause radiating pain into the legs and feet. Nerve root compression results in pain traveling to the area of the root. (CX-10, p. 9). Dr. Heard testified Claimant's complaints are consistent with the March 2001 MRI indicating a thoracic disc injury, stating the pain from such an injury could mimic pain from a sharp blow to the chest. He also stated the right rib pain marked on Quick Care Clinic's diagram could be associated with a thoracic disc injury, rib fracture or local contusion. *Id.* 10-15. On cross-examination, Dr. Heard testified he is not sure if Claimant's leg and foot pains are related to his thoracic or lumbar injury. He also stated Claimant's cervical findings could explain the radiation of pain into his arms, although he could not pinpoint which abnormality was the direct cause. He stated varying arm pains are consistent with Claimant's cervical MRI because there was not a huge herniation, just multiple smaller abnormalities, thus intermittent symptoms are likely. Dr. Heard also testified Claimant's cervical findings are consistent with his negative EMG test, which would have only be positive if there were more substantial cervical legions. *Id.* at 24-27.

On cross-examination, Dr. Heard clarified Claimant has no new lumbar disc problems. He testified he performed a purcutaneous diskectomy at Claimant's L4-5 level in 1991, and the January 31, 2001, lumbar MRI shows residual disc herniation from that surgery. Dr. Heard also stated Claimant had a left central disk protrusion at the T11-12 level in 1991, as well. However, he testified Claimant's current protrusion at T11-12 is probably post-traumatic because Claimant would not be able to do heavy work if the protrusion had been there for 10 years. Dr. Heard opined Claimant's accident caused the T9-10 abnormality and aggravated the prior T11-12 protrusion, resulting in nerve compression at the T11-12 level. (CX-10, pp. 28-33).

Dr. Heard testified thoracic disc injuries are uncommon. Absent pathological findings such as osteoporosis or cancer, thoracic disc injuries are usually caused by direct trauma, as opposed to lumbar disc injuries which can be cause by merely lifting a heavy object. He also testified Claimant did not have any pathological disease related problems in his thoracic spine.[10] Furthermore, he stated Claimant's stocky and muscular build suggests his spine is more stable, thus he would suffer less damage than a person not as muscular. (CX-10, p. 17). On cross-examination, Dr. Heard stated pain from a thoracic disc injury may be in the chest, back, or both. Because such injuries with cord

[10] Dr. Heard noted the vertebral hemongioma at T-10 was an unrelated, incidental finding. (CX-10, pp. 16-17).

compression are uncommon, it is difficult to pinpoint the precise symptomology. *Id.* at 21-22.

On April 18, 2001, and at his deposition June 18, 2003, Dr. Heard testified he believes Claimant's injuries are related to his work accident. On March 6, 2002, Dr. Heard opined Claimant was disabled because of his injury, and he still believed that at his deposition. (CX-10, pp. 6-7; CX-10a, p. 2). Dr. Heard testified Claimant is permanently disabled from medium and heavy work, and should be limited to light or sedentary work. Specifically, Claimant's thoracic MRI is disabling, although his cervical condition is not disabling. Claimant's pain relief is complicated by his heart condition, making him an undesirable candidate for heart surgery and limiting the types of medication he can take. Overall, while Dr. Heard found Claimant difficult to communicate with at times, he testified Claimant has complied with his advice and recommendations. (CX-10, pp. 18-21, 39-40).

On cross-examination, Dr. Heard testified Claimant's thoracic disc protrusion would not necessarily have kept him from working. Such protrusion becomes symptomatic and limiting only when it progresses to the point where it compresses the nerves; the severity of the symptoms depends on the extent of the compression. Thus, if there is no compression, there are usually no symptoms. Dr. Heard also stated there is a chance the compression was not symptomatic and Claimant continued to work. He testified Claimant's February 14, 2001, MRI is most likely not indicative of his condition in September 1999; if Claimant had the exact same findings in 1999, he would have had symptoms. *Id.* at 33-34, 41. Dr. Heard noted complaints of back pain would not necessarily arise immediately after an accident; it would depend on other injuries and what caused the most prevalent pain. He testified Claimant also reported pain in his chest wall, neck, and mid and low back. Dr. Heard did not ask Claimant about his pain on the day of his accident, but was aware Claimant's chest, back and neck all started hurting around the date of the accident. *Id.* at 37-39.

Dr. Heard testified he placed Claimant on permanent restriction of light to sedentary work in January 1993, as a result of the purcutaneous L4-5 diskectomy he performed in 1991. However, he clarified vocational restrictions do not imply the individual is incapable of doing something outside his restrictions. He also stated some patients with restrictions return to laboring work anyway. *Id*. at 36, 43-44.

Dr. Heard opined Claimant is not at maximum medical improvement. However, he does not recommend surgery unless his condition becomes extremely worse and Claimant cannot walk or has other gross neurological problems. *Id.* at 45.

(2) Medical Records of Quick Care Clinic, Marilyn Uhr, M.D and Eugene Stueben, M.D.

Claimant reported to Quick Care Clinic on September 3, 1999, seven days following his work incident. Claimant presented with tenderness over the right chest and moderate chest pain. Claimant was diagnosed with blunt trauma to the abdominal chest and referred to Dr. Stueben, a gastrointestinal specialist, for an abdomen catscan. (CX-5, pp. 1-8).

Claimant also saw Dr. Uhr, an internist, on September 3, 1999. An x-ray of his chest and ribs taken at the Lafayette General Medical Center indicated he did not have a rib fracture. (CX-5, p. 8; CX-6, p. 1). Mrs. Stutes left two voice messages for Dr. Uhr, but neither mentioned Claimant's back pain. Dr. Uhr saw Claimant again on January 18, 2000, and reported he was not having any pain. Claimant missed his follow up appointment on February 29, 2000, and did not return to see Dr. Uhr. (CX-6, pp. 4-5).

Claimant first saw Dr. Stueben on September 21, 1999. He presented with rectal bleeding and complained of tingling and sharp pains in his mid back. Dr. Stueben removed colon polyps for Claimant on August 4, 2000. (CX-7, pp. 1-3).

IV. DISCUSSION

Contentions of the Parties

Claimant contends his back injury was directly caused by his work accident in August 1999. He first mentioned his back pain three weeks after his accident, on September 21, 1999. Although he did not seek treatment for his back pain until one year after the incident, Claimant relies on Dr. Heard's testimony the injury may not have been severely symptomatic right away, and nonetheless was probably due to the 1999 accident absent any intervening trauma. Claimant contends Employer has failed to rebut his Section 20(a) presumption because it did not present any medical evidence to contradict Dr. Heard's testimony; he argues the fact that the medical reports from Quick Care Clinic and Dr. Uhr do not indicate back pain is not substantial evidence sufficient to satisfy Employer's burden to rebut the presumption. As such, Claimant contends he is entitled to benefits under the Act. Claimant also asserts while he may be an ineffective communicator, his testimony should not be regarded as incredible.

Claimant contends his average weekly wage should reflect the wage increase he received shortly before the accident. Claimant argues the most accurate way to calculate

average weekly wage is to use Section 10(c), include his wage increase in his annual salary to arrive at an average weekly wage of $930.05.

Employer asserts Claimant's back injury is not related in any way to his August 1999 accident. Specifically, Employer points to the fact that Claimant only mentioned his back injury to Dr. Stueben in passing on September 21, 1999, and did not seek any treatment for it until one year after his accident. As such, Employer contends Claimant's back injury is not causally connected to his accident, and he has not met the Section 20(a) presumption. In the alternative they have presented substantial evidence to contradict the presumption. Employer also argues Claimant's wages from the year prior his accident should be used to calculate his average weekly wage, which they contend is $895.51. Finally, Employer contends Claimant's testimony was confusing, contradictory, and thus unreliable.

B. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[11] 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

[11] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition.

Gooden v. Director, OWCP, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In the present case, although Claimant's testimony was at times confusing, I find any inconsistencies to be innocent and not intentionally misleading. His testimony at the hearing substantially corroborated his deposition and the deposition of Dr. Heard. Claimant impressed me at the hearing, and I find him to be a credible witness. I also find Claimant suffers from multiple back injuries, most notably a thoracic disc injury, which the evidence does not contradict. MRIs taken of Claimant's cervical, thoracic and lumbar spine indicate various abnormalities, including disc protrusions, stenosis, cord compression and nerve root compression. Dr. Heard testified Claimant's symptoms are consistent with the MRI findings and his work accident. As such, I find Claimant has satisfied the first prong of the Section 20(a) presumption.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

In the present case, Claimant asserts he was hit in the chest with a pressure hose while at work on either August 27 or 28, 1999. He testified he told his supervisor immediately following the incident, and he informed the people in Employer's office when he reached shore a few days later. Claimant went to Quick Care Clinic first, where

he was diagnosed with chest pain; there was nothing in the medical record to indicate back pain. Similarly, Claimant did not mention back pains in any of his conversations with Dr. Uhr. Claimant first reported back and chest pains to Dr. Stueben on September 18, 1999, although nothing was done for him at this time. Claimant returned to work, which he continued until April 2000, when he suffered a heart attack. I note Claimant did not seek treatment for his back until August 2000, one year following his injury.

As he is Claimant's treating physician, I find Dr. Heard's testimony to be particularly relevant and persuasive as to this issue. Dr. Heard stated thoracic disc injuries are rare; however, they are more likely caused by blunt trauma than lifting a heavy object, such as with a lumbar disc injury. The evidence indicates Dr. Heard opined on three different occasions Claimant's accident probably caused his back injury: at his first examination of Claimant on August 30, 2000; in a note written April 18, 2001; and at his deposition on June 18, 2003. Specifically, Dr. Heard stated if Claimant was not symptomatic prior to August 1999, and there was no intervening trauma after the date of the accident, Claimant's injuries are most likely the result of his work accident.

Dr. Heard also testified Claimant's complaints are consistent with his injuries. Dr. Heard stated a thoracic disc injury may not be symptomatic absent cord compression and nerve root compression. These conditions may develop over time, and are not necessarily present immediately following the trauma. Thus, Claimant could have continued working with little or no pain following his trauma, only to become symptomatic at a later date. Moreover, cord and nerve root compressions may cause varying, radiating pains, explaining the pain Claimant has in his arms and legs and the fact that his complaints were not always identical at each visit. Also, a thoracic disc injury may result in chest or back pains, or both, including radiating pains from the chest to the back. Dr. Heard testified the Quick Care diagram denoting right anterior chest pain may be consistent with a thoracic disc injury.

Dr. Heard also stated it is not uncommon for an individual to focus on the most prevalent pain he is experiencing. I note Claimant was hit in the chest, and his first main complaint was of chest pain. Thus, even if he had some back symptoms immediately following his work incident, they may have been overshadowed by Claimant's chest pain and then heart condition; according to Dr. Heard's opinion this is not unusual. Claimant himself testified he did not seek treatment for his back right away because he had money problems and was more concerned with his heart condition. I find this to be consistent with Dr. Heard's testimony summarized above. Claimant has established his injury is probably related to his work accident; the one year delay in reporting it could be because it was not symptomatic, it was overshadowed by other pains, or the pain was not severe enough to stop working.

In light of the foregoing, I find Claimant's back injury could have been caused by his work accident in August 1999. As such, I find Claimant has established the Section 20(a) presumption.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing *Conoco, Inc.*, 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption").

In the present case, Employer failed to contradict any of the testimony presented by Dr. Heard. Employer repeatedly relied upon the fact that Claimant did not report his back injury right away as evidence that his 1999 work incident did not cause his back injury. However, Employer did not address Dr. Heard's statement that Claimant's back injury could have become symptomatic and disabling over time, not necessarily immediately following the accident, or that Claimant's back injury may have been overshadowed by his more prevalent chest injury and heart condition. Employer attempted to discredit Claimant's testimony as being confusing and contradictory. However, except for some confusion regarding specific names and dates, Claimant's testimony was generally consistent with his previous deposition and Dr. Heard's medical records and deposition. I do not find Claimant's mistakes to be sufficient to render the entirety of his testimony incredible.

Employer did not present any medical evidence, or otherwise rebut the testimony and medical records of Dr. Heard. As such, I find Employer has failed to rebut Claimant's Section 20(a) presumption. Therefore, Claimant is entitled to the presumption and has successfully established a *prima facie* case of disability under the Act.

(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

As I find Employer has failed to rebut the Section 20(a) presumption in this case, it is not necessary to weigh the record as a whole. However, in the alternative, I find the record as a whole in favor of Claimant's position for the reasons previously discussed.

C. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2003). Disability is an economic concept based upon a medical foundation distinguished by either its nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General*

Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

A *prima facie* case of total disability is established when a claimant can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). A claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991).

In the present case, Dr. Heard testified Claimant has not yet reached maximum medical improvement. He restricted Claimant from performing medium to heavy duty work because of his back injury, thus Claimant cannot return to his former job as a field service technician. This was not rebutted or contradicted by Employer, who failed to submit evidence of suitable alternative employment. Thus, I find Claimant to be temporarily and totally disabled as of August 30, 2000, the date he first saw Dr. Heard.

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c) (2001), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1) (2002); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). When a claimant suffers a latent traumatic injury, benefits are to be paid based on the average weekly wage at the time of

the accident which caused the injury, not at the time the injury becomes manifest. *LeBlanc v. Cooper/T Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195 (CRT)(5th Cir. 1997). Additionally, overtime wages are to be included in the average weekly wage if they were a normal and regular part of the claimant's employment. *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).

1. Sections 10(a) and (b)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (stating that Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co. v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998).

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c) (2001); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies where an injured employee has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b).

In the present case, Claimant's wage records indicate he worked 12 or 14 day shift, he is not a 5 or 6-day worker. Additionally, the wage records submitted do not indicate exactly how many days Claimant actually worked in the 52 weeks prior to his accident. Therefore, it is impossible to calculate his average daily wage for the purposes of this section. I therefore find Section 10(a) cannot be fairly applied to Claimant. The record does not indicate that this method of calculating average weekly wage would be more effective as regards to a similarly situated employee. Moreover, there are no wage records of such employee. As such, Section 10(b) does not apply in this case, either.

2. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297-98 (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-22 (5th Cir. 1991); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of the ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Hall*, 139 F.3d at 1031. The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). One way to compute a claimant's annual earning capacity under 10(c) is to multiply his wage rate by a time variable; the Board has approved this use of a claimant's hourly wage. *Lozupone v. Lozupone & Sons*, 14 BRBS 462, 464-65 (1981). To arrive at the claimant's average weekly wage, this annual earning capacity is divided by 52. 33 U.S.C. § 910(d).

The purpose of calculating a claimant's average weekly wage is to determine his earning capacity at the time of his injury. That is, the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980). Under 10(c), the amount actually earned by the claimant in the 52 weeks prior to his accident is not controlling, and may not be a fair and reasonable representation of his wage earning capacity at that time.

Specifically, where the claimant's wages increased prior to the accident because of a promotion or pay raise, it would be unfair to include the lower rate of pay in his average weekly wage. *See National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979); *Gallagher*, 219 F.3d at 426 (ALJ correctly carved out a four-week period of lost work and divided the claimant's earnings by 48 instead of 52 to arrive at his wage earning capacity); *Le v. Sioux City and New Orleans Terminal Co.*, 18 BRBS 175, 177 (1986)(finding wages earned prior to a raise did not reflect earning capacity because pre-raise wages reflect earlier work at a lower rate of pay); *Lozupone v. Lozupone & Sons*, 14 BRBS 462, 464-65 (1981).

I find Section 10(c) to be the appropriate section to use in calculating Claimant's average weekly wage because Sections 10(a) and (b) are inapplicable, and the 52 weeks prior to his injury are an unfair representation of his annual wages. Claimant's wage records indicate he worked a total of 2,834.25 hours between September 3, 1998 and August 29, 1999.[12] The records also indicate he received pay raise starting July 11, 1999, thus he was earning $19.05 per hour at the time of his accident. (JX-1, p. 4). There is nothing to contradict the argument Claimant received this higher wage the remainder of 1999, and would have continued to receive it absent his work-related injury. To consider his lower wages in calculating his average weekly wage would suppress Claimant's wage earning capacity at the time of his accident and be contrary to the prevailing law. In light of the foregoing, Claimant's average weekly wage shall be calculated by multiplying his hourly rate at the time of his accident ($19.05) by the number of hours he worked in the 52 weeks prior to his injury (2,834.25), for an annual earning capacity of $53,992.46. This number shall be divided by 52 weeks to arrive at an average weekly wage of $1,038.42.

D. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a

[12] I note the parties submitted fourteen of Claimant's pay stubs, and ten of them indicated he earned overtime pay. As such, I find Claimant was paid overtime wages as a normal and regular part of his employment and shall be included in his average weekly wage. (*See* JX-1).

fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

E. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 29, 1999, to present and continuing based on an average weekly wage of $1,038.32.

2. Employer shall be entitled to a credit for the wages paid to Claimant after August 29, 1999.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE